

**SUBCHAPTER C: FINANCIAL ASSURANCE MECHANISMS FOR
CLOSURE, POST CLOSURE, AND CORRECTIVE ACTION
§§37.200, 37.201, 37.211, 37.221, 37.231, 37.241, 37.251, 37.261, 37.271, 37.281
Effective September 14, 2006**

§37.200. Applicability.

This subchapter applies to an owner or operator required to provide financial assurance for closure, post closure, or corrective action. For additional requirements relating to specific mechanisms and exceptions allowed under a program area, refer to the applicable subchapter(s) of this chapter.

Adopted February 24, 2000

Effective March 21, 2000

§37.201. Trust Fund.

(a) An owner or operator may satisfy the requirements of financial assurance by establishing either a fully funded trust or a pay-in trust which conforms to the requirements of this section, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action), and submitting an originally signed duplicate of the executed trust agreement to the executive director.

(b) The trustee must be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency.

(c) The wording of the trust agreement must be identical to the wording specified in §37.301(a) of this title (relating to Trust Agreement) including a formal certification of acknowledgment as specified in §37.301(b) of this title.

(d) Schedule A of the trust agreement as specified in §37.301(a) of this title must be updated within 60 days after an approved change in the amount of the current cost estimate or annual inflation adjustments.

(e) A fully funded trust requires that the initial payment into the trust fund be at least equal to the current cost estimate, or when a combination of mechanisms are used in accordance with §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms), the initial payment plus the amount of the combined mechanism(s) must be at least equal to the current cost estimate. A receipt from the trustee for the initial payment must be submitted by the owner or operator to the executive director with the originally signed duplicate of the trust agreement.

(f) In the case of a pay-in trust for closure or post closure, payments into the trust fund must be made annually by the owner or operator over the term of the initial permit or over the remaining life of the facility, whichever is shorter. In the case of a pay-in trust for corrective action for known releases,

the payments into the trust fund must be made annually by the owner or operator over one-half of the estimated length of the corrective action program. The periods referred to in this subsection are the pay-in periods. The payments into the trust fund must be made in accordance with this subsection. During the period of post closure, a pay-in trust for post closure may not be used.

(1) For a pay-in trust used to demonstrate financial assurance for closure and post closure, the first payment into the fund must be at least equal to the current cost estimate for closure or post closure, less the amount of the combined mechanisms, divided by the number of years in the pay-in period. Subsequent payments must be made no later than 30 days after each anniversary date of the first payment. The amount of subsequent payments must be determined by the following formula:

$$\text{Next payment} = \frac{\text{CE} - \text{CV}}{\text{Y}}$$

where CE is the current closure and post closure cost estimates, CV is the current value of the trust fund, and Y is the number of years remaining in the pay-in period.

(2) For a pay-in trust used to demonstrate financial assurance for corrective action, the first payment into the trust fund must be at least equal to one-half of the current cost estimate for corrective action, less the amount of the combined mechanisms, divided by the number of years in the corrective action pay-in period. The amount of subsequent payments must be determined by the following formula:

$$\text{Next payment} = \frac{\text{RB} - \text{CV}}{\text{Y}}$$

where RB is the most recent estimate of the required trust fund balance for corrective action, CV is the current value of the trust fund, and Y is the number of years remaining in the pay-in period.

(3) The owner or operator may accelerate payments into the trust fund or may deposit the full amount of the current cost estimate at the time the fund is established. However, the owner or operator must maintain the value of the fund at no less than the value that the fund would have if annual payments were made as specified in paragraphs (1) or (2) of this subsection.

(4) If the owner or operator establishes a trust fund after having used another financial assurance mechanism, the first payment must be at least equal to the amount that the fund would contain if the trust fund was established when the permit was initially issued, and subsequent payments must be made as specified in paragraphs (1) or (2) of this subsection.

(g) After the initial payment for a fully funded trust or after the pay-in period is completed for a pay-in trust, whenever the current cost estimate changes, the owner or operator must compare the new

estimate with the trustee's most recent annual valuation of the trust fund. If the value of the fund is less than the amount of the new estimate, the owner or operator, within 30 days after the change in the current cost estimate, must either deposit an amount into the fund so that its value after this deposit at least equals the amount of the current cost estimate, or obtain an additional financial assurance mechanism as specified in this subchapter to cover the difference.

(h) If the value of the trust fund is greater than the total amount of the current cost estimate, the owner or operator may submit a written request to the executive director for release of the amount in excess of the current cost estimate.

(i) Within 60 days after receiving a request from the owner or operator for release of funds as specified in subsection (h) of this section, the executive director shall instruct the trustee to release to the owner or operator such funds as the executive director specifies in writing.

(j) An owner or operator or any other person authorized by the executive director to perform closure, post closure, or corrective action may request reimbursement for closure, post closure, or corrective action expenditures by submitting itemized bills to the executive director. The request shall include an explanation of the expenses and all applicable itemized bills. The owner or operator may request reimbursements for partial closure only if sufficient funds are remaining in the trust fund to cover the maximum costs of closing the facility over its remaining operating life. After receiving bills for closure, post closure, or corrective action activities, the executive director shall instruct the trustee to make reimbursement in such amounts as the executive director specifies in writing, if the executive director determines that the partial or final closure, post closure, or corrective action expenditures are in accordance with the approved closure plan, post closure plan, or corrective action activities, or are otherwise justified. If the executive director has reason to believe that the cost of closure, post closure, or corrective action over the remaining life of the facility will be greater than the value of the trust fund, the executive director may withhold reimbursement of such amounts as deemed prudent until it is determined, in accordance with Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action) that the owner or operator is no longer required to maintain financial assurance for final closure, post closure, or corrective action at the facility.

(k) If an owner or operator substitutes other financial assurance as specified in this section for all or part of the trust fund, the owner or operator may submit a written request to the executive director for release of the amount in excess of the current cost estimate covered by the trust fund.

Adopted February 24, 2000

Effective March 21, 2000

§37.211. Surety Bond Guaranteeing Payment.

(a) An owner or operator may satisfy the requirements of financial assurance by obtaining a surety bond which conforms to the requirements of this section, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements

and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action), and submitting an originally signed surety bond to the executive director.

(b) The surety company issuing the bond must, at a minimum, be among those listed as acceptable sureties on Federal bonds in Circular 570 of the United States Department of the Treasury.

(c) The wording of the surety bond must be identical to the wording specified in §37.311 of this title (relating to Payment Bond).

(d) The bond must guarantee that the owner or operator shall:

(1) fund the standby trust fund as required in §37.161 of this title (relating to Establishment of a Standby Trust) in an amount equal to the penal sum of the bond before the beginning of final closure of, or corrective action at, the facility;

(2) fund the standby trust fund as required in §37.161 of this title in an amount equal to the penal sum within 15 days after an administrative order to begin final closure or corrective action issued by the executive director becomes final, or within 15 days after an order to begin final closure or corrective action is issued by the United States district court or other court of competent jurisdiction; or

(3) provide alternate financial assurance as specified in this subchapter, and obtain the executive director's written approval of the assurance provided, within 90 days after receipt by both the owner or operator and the executive director of a notice of cancellation of the bond from the surety.

(e) Under the terms of the bond, the surety shall become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond.

(f) The penal sum of the bond must be in an amount at least equal to the current cost estimate, except as provided in §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms), §37.51 of this title (relating to Use of a Financial Assurance Mechanism for Multiple Facilities), or §37.52 of this title (relating to Use of a Universal Financial Assurance Mechanism for Multiple Facilities and Program Areas).

(g) Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the executive director. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the executive director, as evidenced by the return receipts.

Adopted February 24, 2000

Effective March 21, 2000

§37.221. Surety Bond Guaranteeing Performance.

(a) An owner or operator may satisfy the requirements of financial assurance by obtaining a surety bond which conforms to the requirements of this section, in addition to the requirements

specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action), and submitting an originally signed surety bond to the executive director.

(b) The bond must, at a minimum, be among those listed as acceptable sureties on federal bonds in Circular 570 of the United States Department of Treasury.

(c) The wording of the surety bond must be identical to the wording specified in §37.321 of this title (relating to Performance Bond).

(d) A surety bond guaranteeing performance of closure, post closure, or corrective action must guarantee that the owner or operator shall:

(1) perform closure or post closure in accordance with the closure plan, post closure plan, and other applicable requirements of the permit, or perform corrective action in accordance with the permit or other applicable requirements; and

(2) provide alternate financial assurance as specified in this subchapter, and obtain the executive director's written approval of the assurance provided within 90 days after receipt by both the owner or operator and the executive director of a notice of cancellation of the bond from the surety.

(e) Under the terms of the bond, the surety shall become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond. Following a determination by the executive director that the owner or operator has failed to perform closure or post closure in accordance with the closure plan, post closure plan, or other applicable requirements of the permit, or has failed to perform corrective action in accordance with the permit or other applicable requirements, under terms of the bond, the surety shall either perform closure, post closure, or corrective action as guaranteed by the bond or deposit the amount of the penal sum of the bond into a standby trust, in accordance with §37.161 of this title (relating to Establishment of a Standby Trust).

(f) Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the executive director. Cancellation of the bond may not occur, however, during the 120 days beginning on the date of the receipt of the notice of cancellation by both the owner or operator and the executive director, as evidenced by the return receipts. If the owner or operator fails to provide an alternate financial assurance mechanism as specified in this subchapter within 90 days of the receipt of notice of cancellation from the surety to the executive director and to the owner or operator, and obtain written approval of the alternate assurance from the executive director, the surety shall be required to perform under the terms of the bond.

(g) The penal sum of the bond must be in an amount at least equal to the current cost estimate, except as provided in §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms) or §37.52 of this title (relating to Use of a Universal Financial Assurance Mechanism for Multiple Facilities and Program Areas).

(h) The surety shall not be liable for deficiencies in the performance of closure, post closure, or corrective action by the owner or operator after the executive director releases the owner or operator from the requirements of this section, in accordance with Subchapter A of this chapter.

Adopted February 24, 2000

Effective March 21, 2000

§37.231. Irrevocable Standby Letter of Credit.

(a) An owner or operator may satisfy the requirements of financial assurance by obtaining an irrevocable standby letter of credit which conforms to the requirements of this section, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action), and submit an originally signed irrevocable standby letter of credit to the executive director.

(b) The financial institution issuing the irrevocable standby letter of credit shall be an entity that has the authority to issue irrevocable standby letters of credit and whose operations are regulated and examined by a federal or state agency.

(c) The wording of the irrevocable standby letter of credit must be identical to the wording specified in §37.331 of this title (relating to Irrevocable Standby Letter of Credit).

(d) The originally signed irrevocable standby letter of credit must be accompanied by a letter from the owner or operator referring to the irrevocable standby letter of credit by number, issuing institution, and date, and providing the following information for each facility: the permit number, name and physical and mailing addresses of the facility, and the amount of funds assured for closure, post closure, or corrective action by the irrevocable standby letter of credit.

(e) The letter of credit must be irrevocable and issued for a period of at least one year. The irrevocable standby letter of credit must provide that the expiration date shall be automatically extended for a period of at least one year unless, at least 120 days before the current expiration date, the issuing institution notifies both the owner or operator and the executive director by certified mail of a decision not to extend the expiration date. Under the terms of the irrevocable standby letter of credit, the 120 days shall begin on the date when both the owner or operator and the executive director have received the notice, as evidenced by the return receipts.

(f) The irrevocable standby letter of credit must be issued in an amount at least equal to the current cost estimate, except as provided in §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms), §37.51 of this title (relating to Use of a Financial Assurance Mechanism for Multiple Facilities), or §37.52 of this title (relating to Use of a Universal Financial Assurance Mechanism for Multiple Facilities and Program Areas).

(g) Following a determination that the owner or operator has failed to perform closure or post closure in accordance with the closure plan, post closure plan, and other applicable requirements of the

permit, or has failed to perform corrective action in accordance with the permit or other applicable requirements, the executive director may draw on the irrevocable standby letter of credit.

(h) If the owner or operator does not establish alternate financial assurance as specified in this subchapter and obtain written approval of such alternate assurance from the executive director within 90 days after receipt by both the owner or operator and the executive director of a notice from the issuing institution that it has decided not to extend the irrevocable standby letter of credit beyond the current expiration date, the executive director shall draw on the irrevocable standby letter of credit. The executive director may delay the drawing if the issuing institution grants an extension of the term of the letter of credit. During the last 30 days of any such extension, the executive director shall draw on the irrevocable standby letter of credit if the owner or operator has failed to provide alternate financial assurance as specified in this subchapter and obtain written approval of such assurance from the executive director.

(i) Upon termination, in accordance with §37.61 of this title (relating to Termination of Mechanisms), the executive director shall return the irrevocable standby letter of credit to the issuing institution.

Adopted February 24, 2000

Effective March 21, 2000

§37.241. Insurance.

(a) An owner or operator may satisfy the requirements of financial assurance by obtaining insurance which conforms to the requirements of this section, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action), and submitting an originally signed certificate to the executive director.

(b) At a minimum, the insurer must be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states.

(c) The wording of the certificate of insurance must be identical to the wording specified in §37.341 of this title (relating to Certificate of Insurance).

(d) The insurance policy must be issued for a face amount at least equal to the current cost estimate for closure, post closure, or corrective action, except when a combination of mechanisms are used in accordance with §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms) or §37.52 of this title (relating to Use of a Universal Financial Assurance Mechanism for Multiple Facilities and Program Areas). Actual payments by the insurer shall not change the face amount, although the insurer's future liability shall be lowered by the amount of the payments.

(e) The insurance policy must guarantee that funds shall be available to provide for closure, post closure, or corrective action of the facility. The policy shall also guarantee that once closure, post closure, or corrective action begins, the issuer shall be responsible for paying out funds, up to an

amount equal to the face amount of the policy, upon the direction of the executive director, to such party or parties as the executive director specifies.

(f) An owner or operator or any other person authorized to perform closure, post closure, or corrective action may request reimbursement for closure, post closure, or corrective action expenditures by submitting itemized bills to the executive director. The request shall include an explanation of the expenses and all applicable itemized bills. The owner or operator may request reimbursement for partial closure only if the remaining value of the policy is sufficient to cover the maximum costs of closing the facility over its remaining operating life. Within 60 days after receiving bills for closure, post closure, or corrective action activities, the executive director shall determine whether the closure, post closure, or corrective action expenditures are in accordance with the approved closure, post closure, or corrective action activities or are otherwise justified, and if so, shall instruct the insurer to make reimbursement in such amounts as the executive director specifies in writing. If the executive director has reason to believe that the maximum cost of closure, post closure, or corrective action over the remaining life of the facility will be greater than the face amount of the policy, the executive director may withhold reimbursement of such amounts as deemed prudent until the executive director determines, in accordance with Subchapters A and B of this chapter, that the owner or operator is no longer required to maintain financial assurance requirements for closure, post closure, or corrective action of the facility. If the executive director does not instruct the insurer to make such reimbursements, the executive director shall provide the owner or operator with a detailed written statement of reasons.

(g) The owner or operator must maintain the policy in full force and effect until the executive director consents to termination of the policy. Failure to pay the premium, without substitution of alternate financial assurance as specified in this subchapter, shall constitute a violation of these regulations, warranting such remedy as the executive director deems necessary. Such violation shall be deemed to begin upon receipt by the executive director of a notice of future cancellation, termination, or failure to renew due to nonpayment of the premium, rather than upon the date of expiration of the policy.

(h) The policy must provide that the insurer may not cancel, terminate, or fail to renew the policy except for failure to pay the premium. The automatic renewal of the policy shall, at a minimum, provide the insured with the option of renewal at the face amount of the expiring policy. If there is a failure to pay the premium, the insurer may elect to cancel, terminate, or fail to renew the policy by sending notice by certified mail to the owner or operator and the executive director. Cancellation, termination, or failure to renew may not occur, however, during 120 days beginning with the date of receipt of the notice by both the executive director and the owner or operator, as evidenced by the return receipts.

(i) Cancellation, termination, or failure to renew may not occur and the policy shall remain in full force and effect in the event that on or before the date of expiration:

- (1) the executive director deems the facility abandoned; or

(2) the permit expires, is terminated, is revoked, or a new or renewal permit is denied;
or

(3) closure is ordered by the executive director of the commission or by a United States district court or other court of competent jurisdiction; or

(4) the owner or operator is named as debtor in a voluntary or involuntary proceeding under Title 11 (Bankruptcy), United States Code; or

(5) the premium due is paid.

(j) Each policy must contain a provision allowing assignment of the policy to a successor owner or operator. Such assignment may be conditional upon consent of the insurer, provided such consent is not unreasonably refused.

(k) For insurance policies providing coverage for post closure, commencing on the date that liability to make payments pursuant to the policy accrues, the insurer will thereafter annually increase the face amount of the policy. Such increase must be equivalent to the face amount of the policy, less any payments made, multiplied by an amount equivalent to 85% of the most recent investment rate or of the equivalent coupon issue yield announced by the United States Treasury for 26-week Treasury securities.

Adopted February 24, 2000

Effective March 21, 2000

§37.251. Financial Test.

(a) An owner or operator may satisfy the requirements of financial assurance by establishing a financial test which conforms to the requirements of this section, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action).

(b) To pass this test, the owner or operator must meet the criteria of either paragraph (1) or (2) of this subsection:

(1) the owner or operator must have:

(A) two of the following three ratios: a ratio of total liabilities to net worth less than 2.0; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; and a ratio of current assets to current liabilities greater than 1.5; and

(B) net working capital and tangible net worth each at least six times the sum of the current cost estimates, liability coverage requirements, and any other financial assurance obligations under the Texas Commission on Environmental Quality (TCEQ) or other federal or state environmental regulations assured by a financial test; and

(C) tangible net worth of at least \$10 million; and

(D) assets located in the United States amounting to at least 90% of the owner's or operator's total assets or at least six times the sum of the current cost estimates, liability coverage requirements, and any other financial assurance obligations under the TCEQ or other federal or state environmental regulations assured by a financial test;

(2) the owner or operator must have:

(A) a current rating for his most recent bond issuance of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A, or Baa as issued by Moody's; and

(B) tangible net worth at least six times the sum of the current cost estimates, liability coverage requirements, and any other financial assurance obligations under the TCEQ or other federal or state environmental regulations assured by a financial test; and

(C) tangible net worth of at least \$10 million; and

(D) assets located in the United States amounting to at least 90% of the owner's or operator's total assets or at least six times the sum of the current cost estimates, liability coverage requirements, and any other financial assurance obligations under the TCEQ or other federal or state environmental regulations assured by a financial test.

(c) To demonstrate that the requirements of the test are being met, the owner or operator shall submit the following items to the executive director:

(1) a letter signed by the owner's or operator's chief financial officer worded identically to the wording specified in §37.351 of this title (relating to Financial Test). If an owner or operator is using the financial test to demonstrate assurance for closure, post closure, or corrective action as specified in Subchapter B of this chapter and liability coverage as specified in Subchapter E of this chapter (relating to Financial Assurance Requirements for Liability Coverage), the owner or operator must submit the letter specified in the Financial Test for Liability, Part B in §37.651 of this title (relating to Financial Test for Liability) to cover both forms of financial responsibility. A separate letter as specified in §37.351 of this title is not required; and

(2) a copy of the owner's or operator's independently audited year-end financial statements for the latest fiscal year including the "unqualified opinion" of the auditor; and

(3) a special report from the owner's or operator's independent certified public accountant to the owner or operator stating that:

(A) the accountant has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements; and

(B) in connection with that procedure:

(i) such amounts were found to be in agreement; or

(ii) no matters came to the attention of the accountant which caused them to believe that the specified data should be adjusted; and

(4) a written verification of the current bond rating from the applicable bond rating agency, if the owner or operator is using Alternative II of the letter signed by the owner's or operator's chief financial officer specified in §37.351 of this title; and

(5) a schedule identifying intangible assets used to calculate tangible net worth.

(d) After the initial submission of items specified in subsection (c) of this section, the owner or operator must send updated information to the executive director within 90 days after the close of each succeeding fiscal year. This information shall consist of all items specified in subsection (c) of this section.

(e) If the owner or operator no longer meets the requirements of subsection (b) of this section, a notice shall be sent to the executive director of intent to establish alternate financial assurance as specified in this subchapter. The notice must be sent by certified mail within 90 days after the end of the fiscal year for which the year-end financial data show that the owner or operator no longer meets the requirements. The owner or operator shall provide the alternate financial assurance within 120 days after the end of such fiscal year.

(f) The executive director may, based on a reasonable belief that the owner or operator may no longer meet the requirements of subsection (b) of this section, require reports of financial condition at any time from the owner or operator in addition to those specified in subsection (c) of this section. If the executive director finds, on the basis of such reports or other information, that the owner or operator no longer meets the requirements of subsection (b) of this section, the owner or operator must provide alternate financial assurance as specified in this subchapter within 30 days after notification of such a finding.

(g) The executive director may disallow use of this test on the basis of qualifications in the opinion expressed in the independent certified public accountant's report on examination of the owner's or operator's financial statements. An adverse opinion or disclaimer of opinion shall be cause for disallowance. The executive director shall evaluate other qualifications on an individual basis. The owner or operator shall provide alternate financial assurance as specified in this subchapter within 30 days after notification of the disallowance.

§37.261. Corporate Guarantee.

(a) An owner or operator may satisfy the requirements of financial assurance for closure, post closure, or corrective action by obtaining a written guarantee, hereafter referred to as "corporate guarantee," which conforms to the requirements of this section, in addition to the requirements as specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action).

(b) The guarantor shall be the direct or higher-tier parent corporation of the owner or operator or a corporation with a substantial business relationship with the owner or operator. The guarantor must meet the requirements for owners or operators as specified in §37.251 of this title (relating to Financial Test). The guarantor must comply with the terms of the corporate guarantee.

(c) The wording of the corporate guarantee must be identical to the wording specified in §37.361 of this title (relating to Corporate Guarantee). The corporate guarantee shall accompany the items sent to the executive director as specified in §37.251(c) of this title.

(d) If the guarantor has a substantial business relationship with the owner or operator, in addition to the requirements specified in this chapter for the financial test and corporate guarantee, the guarantor will submit a description of the substantial business relationship and the value received in consideration of the guarantee; an original or certified original copy of the Resolution by the Board of Directors or a certified letter from the chief financial officer, authorizing the corporate guarantee on behalf of the entity; an original or certified original copy of the Resolution by the Board of Directors authorizing the formation or acquisition of the guaranteed entity; an organizational chart which shows the relationship between the two entities; the partnership agreement or other agreements, articles, or bylaws which set out the formation, structure, and operation of the guaranteed entity. After the initial submission of these items to demonstrate a substantial business relationship, if there has been no change in the substantial business relationship, the chief financial officer may submit a letter attesting that there has been no change.

(e) The terms of the corporate guarantee shall provide that:

(1) if the owner or operator fails to perform closure, post closure, or corrective action at the facility(ies) covered by the corporate guarantee in accordance with the permits and other applicable requirements whenever required to do so, the guarantor shall do so or establish a trust fund as specified in §37.201 of this title (relating to Trust Fund) in the name of the owner or operator in the amount of the current cost estimate;

(2) the corporate guarantee shall remain in force unless the guarantor sends notice of termination by certified mail to the owner or operator and the executive director and the owner or operator has obtained, and the executive director has approved, alternative financial assurance; and

(3) if the owner or operator fails to provide alternate financial assurance as specified in this subchapter and obtain the written approval of such alternate assurance from the executive director

within 90 days after receipt by both the owner or operator and the executive director of a notice of termination of the corporate guarantee from the guarantor, the guarantor shall provide such alternate financial assurance in the name of the owner or operator.

Adopted January 23, 2003

Effective February 12, 2003

§37.271. Local Government Financial Test.

An owner or operator may satisfy the requirements of financial assurance for closure, post closure, or corrective action by establishing a local government financial test or a local government financial test and local government guarantee, which conforms to the requirements of this section, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements; and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action). An owner or operator who satisfies the requirements of paragraphs (1) - (3) of this section may demonstrate financial assurance up to the amount specified in paragraph (4) of this section.

(1) In order to satisfy the financial component of the test, the owner or operator must meet the criteria of either subparagraph (A) or (B) of this paragraph and in addition must meet certain general conditions outlined in subparagraph (C) of this paragraph.

(A) The owner or operator must satisfy each of the following financial ratios based on its most recent audited annual financial statement:

(i) a ratio of cash plus marketable securities to total expenditures greater than or equal to 0.05; and

(ii) a ratio of annual debt service to total expenditures less than or equal to 0.20.

(B) If the owner or operator:

(i) of a facility other than a municipal solid waste landfill has outstanding, rated, general obligation bonds that are not secured by insurance, a letter of credit, or other collateral or guarantee, those bonds must have a current rating of Aaa, Aa, A, or Baa, as issued by Moody's, or AAA, AA, A, or BBB, as issued by Standard and Poor's on all such general obligation bonds; or

(ii) of a municipal solid waste landfill subject to Chapter 330 of this title (relating to Municipal Solid Waste) has bonds as defined in Subchapter R of this chapter (relating to Financial Assurance for Municipal Solid Waste Facilities) and those bonds are not secured by insurance, a letter of credit, or other collateral or guarantee, those bonds must have a current rating of Aaa, Aa, A, or Baa, as issued by Moody's, or AAA, AA, A, or BBB, as issued by Standard and Poor's on all such financial obligations.

(C) In addition to meeting the criteria listed under subparagraph (A) or (B) of this paragraph, the following general conditions must be met.

(i) The owner or operator shall prepare its financial statements in conformity with Generally Accepted Accounting Principles for governments and have its financial statements audited by an independent certified public accountant (or appropriate state agency).

(ii) The owner or operator must not have operated at a deficit equal to 5.0% or more of total annual revenue in each of the past two fiscal years.

(iii) The owner or operator must not currently be in default on any outstanding general obligation bonds.

(iv) The owner or operator must not have any outstanding general obligation bonds rated lower than Baa as issued by Moody's or BBB as issued by Standard and Poor's.

(v) The owner or operator must not have received an adverse opinion, disclaimer of opinion, or other qualified opinion from the independent certified public accountant (or appropriate state agency) auditing its financial statements as required under clause (i) of this subparagraph. However, the executive director may evaluate qualified opinions on a case-by-case basis and allow use of the financial test in cases where the executive director deems the qualification insufficient to warrant disallowance of use of the test.

(D) The following terms used in this section are defined as follows.

(i) Deficit equals total annual revenues minus total annual expenditures.

(ii) Total revenues is the sum of the following seven items:

(I) "Total Revenues" of the General Fund;

(II) "Total Revenues" of Special Revenue Funds;

(III) "Total Revenues" of the Debt Service Fund;

(IV) "Total Revenues" of Capital Project Funds;

(V) "Total Operating Revenues" of Enterprise Funds;

(VI) if positive, "Total Non-Operating Revenues (Net)" of Enterprise Funds; and

(VII) if positive, "Total Non-Operating Revenues (Net)" of Internal Service Funds.

(iii) Total expenditures is the sum of the following six items:

(I) "Total Expenditures" of the General Fund;

(II) "Total Expenditures" of Special Revenue Funds;

(III) "Total Expenditures" of the Debt Service Fund;

(IV) "Total Operating Expenses Before Depreciation" of Enterprise Funds;

(V) if negative, "Total Non-Operating Revenues (Net)" of Enterprise Funds; and

(VI) if negative, "Total Non-Operating Revenues (Net)" of Internal Service Funds; except if the local government is not using accrual accounting and is not including depreciation in its expenditures, include routine capital outlays and debt repayment as a substitute for depreciation.

(iv) Cash and current investments is the sum of "Cash," "Cash Equivalents" (e.g., bank deposits, very short-term debt securities, money market funds), and "Current Investments" (e.g., interest or dividend bearing securities that are expected to be held for less than one year), in the General Fund, Special Revenue Funds, Debt Service Fund, Enterprise Funds, and Internal Service Funds, as reported on the Comprehensive Annual Financial Report's (CAFR) Combined Balance Sheet. Note that cash, cash equivalents, and current investments are included in this term even if they are: pooled; with a fiscal agent; or restricted, provided that the assets belong to the General Fund, Special Revenue Funds, Debt Service Fund, Enterprise Funds, and Internal Service Funds. Specifically excluded from this definition are accounts receivable, retirement assets, real property, fixed assets, and other non-current assets, as well as any assets (including cash) in Capital Project Funds.

(v) Debt service is the sum of all amounts in any Debt Service category (including bond principal, other debt principal, interest on bonds, interest on other debt) in the General Fund, Special Revenue Funds, Debt Service Fund, and Capital Projects Funds as reported on the CAFR's Combined Statement of Revenues, Expenditures and Changes in Fund Balances/Equity; plus all principal and interest expense in Enterprise Funds and Internal Service Funds, as reported on the CAFR's Combined Statement of Revenues, Expenses and Changes in Retained Earnings/Fund Balances.

(2) In order to satisfy the public notice component of the test, the local government owner or operator must place a reference to the closure, post closure, or corrective action costs assured through the financial test into its next CAFR after the effective date of this section or prior to the initial receipt of waste at the facility, whichever is later. Disclosure must include the nature and source of closure, post closure, or corrective action requirements; the reported liability at the balance sheet date;

the estimated total closure or post closure cost remaining to be recognized; the percentage of landfill capacity used to date; and the estimated landfill life in years. A reference to corrective action costs must be placed in the CAFR not later than 120 days after the corrective action remedy has been selected in accordance with the requirements of §330.415 of this title (relating to Implementation of the Corrective Action Program). For the first year the financial test is used to assure costs at a particular facility, the reference may instead be placed in the operating record until issuance of the next available CAFR if timing does not permit the reference to be incorporated into the most recently issued CAFR or budget. For closure and post closure costs, conformance with Government Accounting Standards Board Statement 18 assures compliance with the public notice component.

(3) In order to satisfy the recordkeeping and reporting component of the test, the local government owner or operator must submit the following four items to the executive director:

(A) a letter signed by the local government's chief financial officer worded as specified in §37.371 of this title (relating to Local Government Financial Test) that:

(i) lists all the current cost estimates covered by a financial test as described in paragraph (4) of this section;

(ii) provides evidence and certifies that the local government meets the conditions of either paragraph (1)(A) or (B), and (1)(C) of this section; and

(iii) certifies that the local government meets the conditions of paragraphs (2) and (4) of this section;

(B) the local government's independently audited year-end financial statements for the latest fiscal year, including the unqualified opinion of the auditor. The auditor must be an independent certified public accountant (CPA) or an appropriate state agency that conducts equivalent comprehensive audits;

(C) a report to the local government from the local government's independent CPA or the appropriate state agency which:

(i) is based on performing an agreed upon procedures engagement relative to the financial ratios required by paragraph (1)(A) of this section, if applicable, and the requirements of paragraph (1)(C)(i), (ii), and (v) of this section; and

(ii) the CPA or state agency's report states the procedures performed and the CPA or state agency's findings; and

(D) a copy of the CAFR used to comply with paragraph (2) of this section and certification that the requirements of General Accounting Standards Board Statement 18 have been met.

(4) The portion of the closure, post closure, or corrective action costs for which an owner or operator can assure under this paragraph is determined as follows.

(A) If the local government owner or operator does not assure other environmental obligations through a financial test, it may assure closure, post closure, or corrective action costs that equal up to 43% of the local government's total annual revenue.

(B) If the local government owner or operator assures other environmental obligations through a financial test, including, but not limited to, those associated with hazardous waste treatment, storage, and disposal facilities under Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste) and 40 Code of Federal Regulations (CFR) Parts 264 and 265, petroleum underground storage tank facilities under Chapter 334 of this title (relating to Underground and Aboveground Storage Tanks) and 40 CFR Part 280, underground injection control facilities under Chapter 331 of this title (relating to Underground Injection Control) and 40 CFR §144.62, polychlorinated biphenyl storage facilities under 40 CFR Part 761, it must add those costs to the closure, post closure, or corrective action costs it seeks to assure under this paragraph. The total that may be assured must not exceed 43% of the local government's total annual revenue.

(5) Annual updates of the financial test documentation must be submitted to the executive director within 180 days after the close of each succeeding fiscal year. This information must consist of all the items required under paragraph (3) of this section.

(6) A local government must satisfy the requirements of the financial test at the close of each fiscal year. If the local government owner or operator no longer meets the requirements of paragraphs (1) - (4) of this section, the local government must send notice to the executive director of intent to establish alternate financial assurance. This notice must be sent within 90 days after the end of the fiscal year for which the year-end financial data shows that the local government no longer meets the requirements. The local government must provide alternate financial assurance within 120 days after the end of such fiscal year.

(7) The local government is no longer required to comply with the requirements of this section when the conditions as specified in §37.61 of this title (relating to Termination of Mechanisms) are met.

(8) The executive director, based on a reasonable belief that the local government owner or operator may no longer meet the requirements of the local government financial test, may require additional reports of financial condition from the local government at any time. If the executive director finds on the basis of such reports or other information, that the local government owner or operator no longer meets the requirements of the financial test, the local government must provide alternate financial assurance as specified in this subchapter within 30 days after notification of such a finding.

§37.281. Local Government Guarantee.

An owner or operator may satisfy the requirements of financial assurance for closure, post closure, or corrective action by obtaining a local government guarantee provided by a local government. The local government guarantee must meet the requirements of this section, in addition to the requirements in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action). The local government guarantor must meet the requirements of the local government financial test in §37.271 of this title (relating to Local Government Financial Test) and must comply with the following terms of the local government guarantee.

(1) If the owner or operator fails to perform closure, post closure, or corrective action of a facility covered by the guarantee, the guarantor will:

(A) perform, or pay a third party to perform, closure, post closure, or corrective action as required; or

(B) establish a fully funded trust fund as specified in §37.201 of this title (relating to Trust Fund) in the name of the owner or operator.

(2) The guarantee will remain in force unless the guarantor sends notice of cancellation by certified mail to the owner or operator and to the executive director. Cancellation may not occur, however, during the 120 days beginning on the date of the receipt of the notice of cancellation by both the owner or operator and the executive director, as evidenced by the return receipts.

(3) If a guarantee is canceled, the owner or operator must, within 90 days following receipt of the cancellation notice by the owner or operator and the executive director, obtain alternate financial assurance and submit evidence of that alternate financial assurance to the executive director. If the owner or operator fails to provide alternate financial assurance within the 90-day period, the guarantor must provide that alternate assurance within 120 days following the guarantor's notice of cancellation.

(4) The owner or operator must submit to the executive director an originally signed local government guarantee worded as specified in §37.381 of this title (relating to Local Government Guarantee) along with the items required in §37.271(3) of this title. The items must be updated annually in accordance with the requirements of the local government financial test.

(5) The owner or operator is no longer required to comply with the requirements of this section when the conditions as specified in §37.61 of this title (relating to Termination of Mechanisms) are met.

(6) If a local government guarantor no longer meets the requirements of §37.271 of this title, the owner or operator must, within 90 days, obtain alternate financial assurance, and submit such evidence of the alternate financial assurance to the executive director. If the owner or operator

fails to obtain alternate financial assurance within that 90-day period, the guarantor must provide that alternate financial assurance within the next 30 days.

Adopted February 24, 2000

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